BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.
THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the 10th Circuit (R. 277) has not yet been reported. There was no opinion of the United States District Court for the Eastern District of Oklahoma rendered but the judgment of the said court is shown (R. 248).

II.
JURISDICTION

The decree sought to be reviewed was entered June 10, 1940 (R. 281). The order was entered overruling petition for rehearing, July 13, 1940 (R. 282). The jurisdiction of this court is invoked under Section 240 (a) of the judicial code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. 347).

III.
STATEMENT OF THE CASE

All of the facts pertaining to the questions involved are contained in sub-paragraph 3 of the Summary Statement of the Matter Involved, as set out in the petition for Writ of Certiorari, supra, and for sake of brevity are not repeated here.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court erred in failing and refusing to hold as res judicata the judgments of the District Court of the United States for the Eastern District of Oklahoma as are shown in 60 Fed. (2d) 228, and 74 Fed. (2d) 139.

2. The Circuit Court erred in following the findings of the trial court wherein there was no pleadings or evidence in the record to support the same.

3. The Circuit Court erred in failing and refusing to consider questions raised by the statement of points in the record.

4. The Circuit Court erred in affirming the District Court and in failing to quiet petitioners' title.

ARGUMENT

I.

The Circuit Court erred in failing and refusing to hold as res judicata the judgments of the District Court of the United States for the Eastern District of Oklahoma as shown in 60 Fed. (2d) 228 and 74 Fed. (2d) 139.

In the opinion of the Circuit Court (R. 278) is the following:

> "The referee made an order requiring Bonner to pay such fees and costs. The District Court affirmed the order but provided that Bonner should

be credited with the amounts paid on the Waddell indebtedness assumed by him."

On an appeal this court ordered a rehearing. See *Bonner* vs. *Cannon,* 10th Cir., 60 Fed. (2d) 228.

When the case went back to the trial court, Judge R. L. Williams made the following findings (R. 172):

> "There has been found as to the Waddell costs, amounting to a total of thirty-two hundred sixty and 29/100 ($3260.29) dollars, that the primary duty and obligation of paying the costs of sale and court costs, which includes the trustee's fees, referee fees and commissions, the fees of the attorney for the trustee and the trustee, the cost of abstracting on each tract and the necessary costs incurred to clear the title, rests upon the Waddell Investment Company, and upon its various assignees, pledgees and investors who held the mortgage assignments from the Waddell Investment Company *for the reason that the Waddell Investment Company appeared in this court as the agent and representative of the various non-resident investors holding securities upon these lands and agreed to the sale of said land through the bankruptcy court;* but the court having further found from the records and files in the controversy that W. M. Bonner has in his hands and under his control moneys and credits of his indebtedness to the said Waddell Investment Company, its assignees, pledgees and investors, by reason of assuming certain mortgages and liens upon tracts Nos. 6, 7, 10, 11, 12, 18, 27 and 29 of the Waddell sale, and having agreed to pay such indebtedness.
>
> "It further appearing, however, as shown by the findings in this controversy that the circumstances are such that W. M. Bonner, as between him and the trustee, is directly chargeable with the sum of eighteen hundred forty-six and 37/100 ($1846.37) dol-

lars, and though entitled to recoup such sum from the Waddell Investment Company, and its assigns, is nevertheless under direct duty to pay such sum to the trustee regardless of his ability to recoup the amount from the Waddell Investment Company and its assigns.

"It is further ordered that the said W. M. Bonner shall pay as garnishee of the Waddell Investment Company, and its assigns, and as the remainder of the so-called Waddell sale costs the further sum of fourteen hundred thirteen and 92/100 ($1413.92) dollars, together with interest upon the larger sum of $3260.29 at the rate of 6% per annum from the 22nd day of October, 1924, until paid; this part, however, to be paid by the said W. M. Bonner only as and when his obligations to the Waddell Investment Company, and its assigns, shall mature according to the terms of those obligations.

"It is further ordered and provided that W. M. Bonner shall be entitled to credit upon his obligations to the Waddell Investment Company, and its assigns, of the entire sum paid by him under this decree insofar as it relates to the costs of the Waddell sale."

From this order an appeal was prosecuted by the First National Bank of Ardmore to the Court of Appeals and Bonner filed his cross appeal and the judgment of Judge Williams, supra, was affirmed. See 74 Fed. (2d) 139.

It is the aforesaid judgments that petitioners pled as res judicata of the question here involved and on which they relied in the trial court and the Court of Appeals.

In compliance with the order of June 14, 1935 (R. 18), Bonner paid to the trustee $5,343.41. See memorandum

opinion of Judge Williams (R. 143) where, at page 146, it is said:

> "The order of June 14, 1935, in no way changes the order of December 11, 1933."

Judge Williams further said at page 147 of the record:

> "It is further contended in the petition that by reason of Bonner having paid to the trustee the costs in the Waddell sale, as provided by order of June 14, 1935, and former orders, the mortgages on certain tracts have been paid, and asks that the mortgages be cancelled of record. In the statement of Waddell Investment Company loans to J. S. Mullen, as same is incorporated in the records of the Circuit Court of Appeals in No. 542, *W. M. Bonner, Appellant* vs. *Hal M. Cannon, Trustee, Appellee,* page 26, there was due on loans on Tracts 6, 7, 10, 11, 18, 27 and 29 as of September 10, 1924, the total sum of approximately $28,485.71; and on the tracts described in Bonner's petition there was due at that time, a total of approximately $18,992.00. *Bonner has paid to the trustee, including the amount paid as garnishee of the Waddell Investment Company, and its assigns, on account of the costs of the Waddell sale, and in accordance with the orders of court above mentioned, the total sum of* $5,343.41, *including interest.*"

This order and judgment was also pled as res judicata and the trial court, as well as the court of appeals, failed to consider the same. See Finding of Trial Court (R. 226) and Opinion of the Circuit Court (R. 227).

We feel and believe that the aforesaid judgments warranted the trial and the Court of Appeals, to grant Bonner the relief prayed for, the cancellation of the mortgage in-

debtedness and quieting his title, as it is conclusively shown that Bonner has paid the $5,343.41 for the Waddell Investment Company, and its assignees and pledgees.

Now the record here shows that the trial court and the court of appeals failed to consider the aforesaid judgments and it is our position that the failure of the courts below to consider said judgments gives rise to the question which this court should review.

This court in the case of *Reynolds* vs. *Stockton,* 140 U. S. 264, says:

> "The right to a trial of an essential issue by the judge of first instance is not a question of procedure, nor can any state statute make it such. That right is one of substance with which the 14th Amendment is concerned."

See *Jacobs* vs. *Marks,* 182 U. S. 591; *Hagar* vs. *Reclamation District No.* 108, 111 U. S. 707.

This court has also said:

> "If the course of procedure cut off the right to try the question raised, it would be as much short of due process of law as the decision of a case involving such a question without allowing an answer would be." See *Castillo* vs. *McConnico,* 168 U. S. 683.

In the case of *Reynolds* vs. *Stockton, supra,* at page 269, it is said:

> "A judgment on a matter outside of the issue must of necessity be all together arbitrating and unjust as it concludes a point upon which the parties

> have not been heard and is upon this very ground that the parties have been heard or, have had the opportunity of a hearing that the law gives so conclusive an effect to matters adjudicated."

See also *Fayerweather* vs. *Rich,* 195 U. S. 276, syllabus being as follows:

> "The application of the due process of law clause of U. S. Const., 5th Amend., is involved so as to sustain a direct appeal to the Federal Supreme Court from a circuit court, where the latter court gave effect, as res judicata, to the judgment of a state court which is claimed unlawfully to have deprived the parties of their property under the forms of law, without any judicial finding of the vital fact which alone could justify such deprivation."

The record conclusively shows that there was no judicial determination of the vital fact relied on by Bonner, that is, the judgments pled by him. If the judgments pled by him were res adjudicata against the respondents, it became and was the duty of the court in the first instance to grant Bonner the relief prayed for and Bonner should not be deprived of the relief prayed for, simply because the trial court and the court of appeals declined to pass upon the question of res judicata. If such a course of procedure were permitted, surely the 5th and 14th amendments of the Constitution of the United States would be violated.

II.

The Circuit Court erred in following the findings of the trial court wherein there were no pleadings or evidence in the record to support the same.

In the opinion of the Circuit Court (R. 277) at page 281, the Circuit Court said:

> "The trial court found that the burden was on Bonner to prove that he had not been reimbursed by Waddell or its assigns for the costs and expenses paid by him and that he had failed to carry that burden."

There are 276 pages of the Transcript on Appeal to the Circuit Court and we have read the entire record and nowhere do we find, by the pleadings or otherwise, any claim made by the appellees that the Waddell Investment Company or its assigns had paid Bonner the costs and expenses paid out by him for the Waddell Investment Company, its assignees and pledgees. On the other hand this record shows that immediately after Bonner paid the trustee $5,343.41, he went to the bankruptcy court and asked for an order permitting him to charge the amount so paid against the remaining money he owed the Waddell Investment Company, its assigns and pledgees, and asked the mortgages be cancelled (R. 143). Judge Williams held that the bankruptcy court was without jurisdiction to grant the relief and dismissed Bonner's petition without prejudice and thereupon Bonner filed the present suit.

We deem it unnecessary to cite authorities to support the proposition that a finding to be authorized, there must be a pleading calling for the same.

Had the Circuit Court given full faith and credit to the judgments relied upon by petitioners the judgment of the

trial court would have been reversed and we say it was the duty of the Court of Appeals to give full faith and credit to the order and judgments in the bankruptcy court and to the orders and judgments referred to in 60 Fed. (2d) 228 and 74 Fed. (2d) 139.

III.

The Circuit Court erred in failing and refusing to consider questions raised by the statement of points in the record.

In the Statement of Points (R. 1), at page 4, the Circuit Court's attention was directed to the fact that there was a flagrant violation of new District Rule 75, subdivision E and H and nowhere in the opinion do you find that the Circuit Court even referred to this point.

This matter was called to the trial court's attention (R. 273), and the trial court denied the relief prayed for (R. 275). This question was presented in the Designation of Points, subdivision 7 (R. 4) and the Court of Appeals declined to pass upon the same.

The clerk of the Court of Appeals in printing the record indexed the same and in the concluding part of the index will be noted certain exhibits not identified and it is matters of this kind that we asked to be eliminated by the trial court and refusal of the trial court to grant relief, error was assigned thereon and the Court of Appeals declined to pass upon the same. There are many duplicators in this

transcript and probably one-half the record as printed was not offered in evidence in the trial court.

We submit that under the District Court rules, Rule 75, subdivision E and H, the trial court was in error in refusing to strike from the transcript, the matter complained of and we submit that the Court of Appeals erred in failing to pass upon the same.

IV.

The Circuit Court erred in affirming the District Court and in failing to quiet petitioners' title.

The record conclusively shows that respondents made their purchase after Mullen was adjudged a bankrupt and by reason of which we say the respondents were lis pen-dens purchasers.

In re Joseph B. Stratton vs. *Andy New,* 283 U. S. 318 (75 L. Ed. 1060), syllabus 3 is as follows:

> "Jurisidiction of a bankrupt court over the property of the bankrupt is so far in rem that the estate is regarded as in custodia legis from the filing of the petition."

Syllabus 4 is as follows:

> "After the filing of a petition in bankruptcy liens cannot be thereafter obtained, nor proceedings be had in other courts, to reach the property of the bankrupt, the district court having acquired the exclusive right to administer all property in the bankrupt's possession."

In re Jones vs. *Merfeldt,* 167 Okla. 520, syllabus 3 is as follows:

> "One who purchases real property from a party to an action involving the title thereto, after the institution and during the pendency of such action, is bound by the judgment rendered therein against his grantor, and acquires no greater rights than his grantor, and this is true whether the purchase is made in good faith or otherwise."

In re Galeener vs. *Reynolds,* 180 Okla. 200, the syllabus being as follows:

> "Under section 193, O. S. 1931, providing: 'When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title, * * * *' persons acquiring an interest in the property under litigation after the filing of the action are bound by the judgment against their grantor."

Under the undisputed facts referred to herein the Circuit Court should have reversed the District Court and should have granted petitioners the relief by the cancellation of record of mortgages he paid off and quieting his title. See *Joseph B. Stratton* vs. *Andy New, supra,* syllabus 7 being as follows:

> "A mortgagee may be restrained from instituting or proceeding further in a foreclosure action against a bankrupt, begun after the date of the petition in bankruptcy."

Syllabus 6 being as follows:

> "The exclusive jurisdiction of a bankruptcy court over controversies in relation to the property of a bankrupt is not limited to the prevention of interference with the use by the trustee in bankruptcy of such property, but extends to the adjudication of questions respecting the title."

It is respectfully submitted that this case is one calling for the exercise by this honorable court, of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court.

Respectfully submitted,

H. A. LEDBETTER,
Ardmore, Oklahoma,
Counselor for Petitioners.

In the Supreme Court of the United States

No. 318, October Term, 1940.

W. M. BONNER AND MABEL R. BONNER, *Petitioners,*

VERSUS

W. L. SUITER, A. C. HAGG, WILLIAM STREHLE AND H. S. HICKOK, *Respondents.*

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MALCOLM E. ROSSER,
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SUBJECT INDEX.

AUTHORITIES.

In the Supreme Court of the United States

No. .....
OCTOBER TERM, 1940.

W. M. BONNER AND MABEL R. BONNER, *Petitioners,*

vs.

W. L. SUITER, A. C. HAGG, WILLIAM STREHLE AND H. S. HICKOK, *Respondents.*

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Statement.

In the statement of the petitioners they omit almost all of the facts upon which the District Court and the Circuit Court of Appeals base their decision. They fail to state that the tracts involved in this litigation together with a number of other tracts of land were ordered sold free from liens and it was further ordered that the purchaser could assume the payments of amounts due under the first mortgages in lieu of paying cash (R. 149-150). Bonner bought these tracts with others October 22, 1924, and on the same day entered into a contract with Waddell Investment Company (R. 36) by the terms of which he agreed that his purchase was subject to the liens held by Waddell and he agreed to pay the delin-

quent interest and expenses in cash, and the Waddell agreed to reduce the interest on the delinquent items from ten to eight per cent. The deeds from the Trustee to Bonner provided that he assumed and agreed to pay the mortgages held by Waddell (R. 39). Sometime after the sale Bonner entered into extension agreements by the terms of which he agreed to pay the amounts secured by the mortgages sought to be cancelled in this case. Still later the Waddell sold the notes and mortgages and extension agreements to the different defendants, respondents herein. Bonner made payments on the notes and never asserted any defense until this suit was brought (R. 114, 121, 123). At the time of the sale Bonner thought he had an equity and bought to protect his second mortgage (R. 106). The Waddell Investment Company became insolvent and went into the hands of a receiver in 1927 (R. 242). Bonner was required to pay certain costs of sale.

Bonner induced the referee's clerk to deliver to him deeds to this property without paying costs and even induced him to pay taxes out of funds belonging to the bankrupt estate (R. 139). Under these conditions originally the Waddell Investment Company was primarily liable for expenses of sale and the orders cited by Bonner were made not for the protection of Bonner but for the protection of the referee and trustee who probably knew nothing about the contract between the Waddell Investment Company and Bonner and if they had known it would have made no difference in the orders which were entered for their protection and not Bonner.

ARGUMENT.

The argument of the respondents will be so brief that we will not attempt to summarize it and will take up questions presented in the order presented by the petitioners on page 2 of their brief.

"2a. Can a person be made to pay a judgment twice and is the judgment first paid *res adjudicata* in a second proceeding?"

There is no such question in the case. The judgment entered in the case of *First National Bank of Ardmore* v. *Bonner*, 74 F. (2d) 139, confirms a judgment against Bonner for costs, taxes and expenses of the trustee sale. The judgment in this case is for the foreclosure of mortgages which he assumed and agreed to pay (R. 245-6).

"2b. When questions are presented by the pleadings, has a court a right to go outside of the pleadings for a basis of his judgment?"

Again there is no such question in the case. The lower court held that Bonner was not entitled to cancellation of his mortgages and that the defendants and cross petitioners were entitled to judgment foreclosing their mortgages (R. 245-6).

"2c. Where a petitioner briefs his case in the court of appeals on the theory as presented by the pleading, has the court of appeals a right to ignore the same?"

A court is not required to decide every question raised. The Circuit Court of Appeals disposed of this case on the grounds that the sale was made for Bonner's benefit and that he should pay the cost. When that was decided nothing else was material.

"2d. Where the record is made up in violation of the new Rule 75 and this is called to the trial court's attention and the court of appeals and each of said courts ignore the contention urged, will this Court grant relief?"

The petitioners complain that Rule 75 has been violated in that testimony and exhibits were placed in the record which were not necessary. Bonner in his statement of points relied on (R. 1 to 4 and 265) raised every question that could possibly have been raised in the case, including the validity of and amounts due on the mortgages and extension agreements and in his designation of portion of the record to be included in the record of appeal omitted everything that would sustain the finding of the lower court. The petitioners filed motion to strike certain parts of the record (R. 273) which motion was overruled by the District Judge (R. 275-6). The record does contain instruments and pleadings which in the opinion of these respondents should not be included in the record, but they were included upon the demand of Bonner. We cannot believe this Court would grant a certiorari on a mere matter of practice which does not involve One Hundred Dollars costs and which was decided against the petitioners by the trial court.

The petitioners allege as their first reason for granting the writ of certiorari (brief 5) "The decision of the Circuit Court of Appeals is in direct conflict with the case of *Bonner* v. *Cannon*, 60 F. (2d) 228, and the case of *First National Bank of Ardmore, Oklahoma*, v. *Bonner*, 74 F. (2d) 139."

These respondents were not parties to either of the above mentioned cases and the District Court so finds (R. 244-5). Bonner fails to set out in his brief wherein any part of the decision in 60 F. (2d) 228, affects the decision in this case, and it does not. The Circuit Court of Appeals in its decision in this case (R. 281) states, "we so held in *First National Bank of Ardmore, Okl.* v. *Bonner*, 10 Cir., 74 F. 2d

139, and we adhere to the conclusion there reached." Since the Circuit Court of Appeals in *First National Bank* case, *supra,* held "again Bonner and Ledbetter testified that they were not present when this order was made, but the evidence most likely to be true is to the contrary," and taking into consideration the fact that the lower court made 32 findings of fact, most of which were against Bonner's contentions, we believe we are justified in stating that the trial court and the Circuit Court of Appeals not only followed the letter of the decision in 74 F. (2d), but also the spirit of that decision.

Conclusion.

The respondents submit that the petitioners have given this Court no reason for issuing a writ of certiorari; that their petition does not set out any of the grounds required by Rule 38, paragraph 5; that there is really no question of law involved and that it is an attempt by the petitioners to have this Court review the 32 findings of fact of the District Court; that if the petitioners are entitled to a writ of certiorari in this case under the claim that the judgment against them is in violation of the 5th and 14th Amendments to the Constitution of the United States, then every litigant who loses a case on the merits is entitled to such a writ.

Since attorney for the petitioners is well-versed in all federal procedure and the rules governing it, we feel justified in suggesting that the petition in this case is filed for the purpose of delay.

Respectfully submitted,

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